IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No.46 of 1993
Date of decision:13.12.2006

The Commissioner of Income Tax, Amritsar

....Petitioner

versus

S.Hoshnak Singh (HUF) Pathankot

....Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Dr. N.L.Sharda, Advocate, for the revenue.

JUDGMENT:

Following question of law has been referred for the opinion of this Court by the Income Tax Appellate Tribunal, Amritsar Branch, Amritsar (for short, 'the Tribunal'), arising out of its order dated 8.7.1992 in ITA No.428(ASR/1987), in respect of assessment year 1972-73:-

> "Whether on the facts and in the circumstances of the case the Tribunal has been in error in upholding the CIT (A)'s decision that the capital gains of Rs.6,27,614/- and related interest of Rs.27,649/- arising out of the acquisition of the agricultural lands situated within the Municipal Limits of Pathankot did not give rise to any capital gain taxable under the Income Tax Act, 1961?"

The assessee owned land which was allotted to him in lieu of land left in Pakistan. The said land was acquired by the Government, which was sought to be taxed for capital gains on transfer of land. The

Commissioner of Income Tax (Appeals) accepted the claim of the assessee on the ground that the assessee had not incur any cost of acquisition and this view was upheld by the Tribunal, relying upon judgment of the Hon'ble Supreme Court in **CIT v. BC Srinivasa Setty,** (1981) 128 ITR 294.

In **BC Srinivasa Setty'**s case (supra), the Hon'ble Supreme Court held that for charging tax under the head "capital gains", the transaction must fall within the computation provisions of Section 38 of the Act. Otherwise, the transaction must be regarded as never intended to be subject to charge. In that case, question was whether a firm was liable to pay capital gains on sale of its goodwill. It was held that consideration received for such a sale could not be subjected to capital gains as cost of acquisition of goodwill was incapable of being determined.

In the present case, question is whether income from capital gains was not liable to be subjected to tax on the same principle. As far as goodwill is concerned, the same is built up over a period of time while the cost of land is not incapable of being ascertained. It cannot be held that there is no cost of acquisition.

Agricultural land is a capital asset under section 2(14) of the Act. Its acquisition is transfer of a capital asset and is liable to tax.

The judgment in **B.C.Srinivasa Setty**'s case (supra) was distinguished by the Hon'ble Supreme Court in **A.R.Krishnamurthy and another v. CIT, Madras**, (1989) 176 ITR 417. it was observed:-

> "....The value of leasehold rights in the cost of acquisition of land being determinable, the computation provisions under the Act are applicable and section 45 would be attracted. In B.C.Srinivasa Setty's case (1981) 128 ITR 294 (SC), the question was whether the transfer of the goodwill of a newly commenced business can give rise to a capital gain taxable under section 45 of the Act. This Court answered the question in the negative. Referring to the charging section and the computation provisions under the Act, this court held that none of those provisions suggest the inclusion of an asset under the head "Capital gain", in the acquisition of which no cost at all can be conceived. Goodwill generated in an individual's business was held to be an asset in which no cost element can be identified or envisaged. It was also held that the date of acquisition of the asset is a

> material factor in applying the computation provisions pertaining to capital gains and in the case of self-generated goodwill, it is not possible to determine the same. The third reason for holding that the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of section 45 of the Act was that it is impossible to determine its cost of acquisition. One of the three reasons given by this court in B.C.Srinivasa Setty's case (1981) 128 ITR 294 are applicable in the present case. We have held that the cost of acquisition of leasehold rights can be determined. The date of acquisition of the right to grant lease has to be the same as the date of acquiring the freehold rights. The ratio of B.C.Srinivasa Setty's case (1981) 128 ITR 294 (SC) is thus not attracted to the question involved in the present case..."

Same view was taken by the Hon'ble Supreme Court in **CIT v. DP Sandu Bros. Chembur P.Limited,** (2005) 273 ITR 1. It was observed:-

> "....In A.R.Krishnamurthy v. CIT, (1989) 176 ITR 417, this court held that it cannot be said conceptually that there is no cost of acquisition of grant of the lease. It held that the cost of acquisition of leasehold rights can be determined. In the present case however, the Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained. In view of the stand taken by the Department before the High Court, we uphold the decision of the High Court on this issue.
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> Were it not for the inability to compute the cost of acquisition under section 48, there is, as we have said, no doubt that a monthly tenancy or leasehold right is a capital asset and that the amount of receipt on its surrender was a capital receipt. But because we have held that section 45 cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other section...."

In the present case, the plea of the assessee was that the cost of acquisition of land was nil and not that the cost of land could not be computed. On this ground alone, it could not be held that capital gain was

not liable to be taxed.

However, from a perusal of order of assessment, we find that the assessee was allotted the land in question before 1.3.1970 i.e., the date on which agricultural land situated within municipal limits was declared to be a capital asset. We have already considered similar issue as far as the valuation of the capital assets in case the same is owned prior to 1.3.1970 in the case of **The Commissioner of Income Tax, Patiala v. Shri Gurcharan Singh, Ludhiana,** ITR Nos. 34 and 35 of 1990, decided on 4.7.2006.

Accordingly, for the reasons stated therein, though it is held that capital gain arising out of acquisition of land in the present case would be exigible to capital gain tax under the Act, however, for the purpose of calculation of capital gain tax, the costs has to be determined as on 1.3.1970.

Reference is disposed of accordingly.

(Adarsh Kumar Goel)
Judge

December 13, 2006 (Rajesh Bindal)
'gs' Judge